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Supreme Court, U.S.
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NO. 02-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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76 pp

QUESTIONS PRESENTED

Petitioner was convicted in 1997 of federal mail and wire fraud, as well as derivative illegal monetary transactions and a RICO violation arising from the fraud charges. Subsequent to his conviction, this Court construed the mail and wire fraud statutes as not encompassing the factual conduct charged in his indictment. The district court, however, denied a timely filed motion to set aside his conviction and sentence under 28 U.S.C. § 2255 and refused, without explanation, to grant a certificate of appealability (COA). The court of appeals also refused to grant a COA. Accordingly, the questions presented are:

1. Whether a federal conviction should be set aside under 28 U.S.C. § 2255 when this Court subsequently construes the relevant substantive criminal statute to make noncriminal the specific factual conduct for which the defendant was charged and convicted?

2. Whether an indictment charging mail and wire fraud (in violation of 18 U.S.C. §§ 1341 and 1343) should allege that the party from whom money or property was purportedly sought is the same as the party deceived, a question that continues to divide the courts of appeals?

3. Whether a court of appeals can by local rule empower the district courts within its jurisdiction to deny a COA to one seeking relief under 28 U.S.C. § 2255 before an appeal is filed, a certificate requested, and without any explanation, contrary to the mandate in Federal Rule of Appellate Procedure 22(b)(1) that when "an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a COA or state why a certificate should not issue," thereby denying the appellant a substantive due process right?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

NO. 02-_____

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Allen W. Stewart, respectfully petitions this Court for a writ of certiorari granting a certificate of appealability to review the judgment of the United States District Court for the Eastern District of Pennsylvania denying him relief pursuant to 28 U.S.C. § 2255 from which both the district court and United States Court of Appeals for the Third Circuit summarily refused, without explanation, to grant a certificate of appealability.

OPINIONS BELOW

1. The order of the court of appeals denying Petitioner's request for a COA to review the district court's decision denying the motion to set aside his conviction and sentence (App. 1a) is unreported. The

court's order denying Petitioner's timely filed petition for rehearing or *en banc* reconsideration (App. 2a) is unreported.

2. The district court's order of June 7, 2001 refusing to issue a COA (App. 22a) was appended to its decision of like date denying Petitioner's § 2255 motion to vacate his conviction and sentence based on this Court's subsequent holding that specific factual conduct for which he was charged is noncriminal (App. 3a-22a). That decision is reported at 151 F. Supp. 2d 572 (E.D.Pa. 2001). Although F.R.App.P. 22(b)(1) requires a district judge upon the filing of a notice of appeal to "either issue a certificate of appealability or state why a certificate should not issue," none was provided in this case; hence, its omission from the Appendix.

3. The district court's pretrial order of October 23, 1997 denying Mr. Stewart's motion to dismiss the superseding indictment pursuant to F.R.Crim.P. 12(b)(2) for failing to state an indictable offense (App. 23a-30a) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its order on August 29, 2002 denying Petitioner a COA as to the district court's decision refusing to set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. The court of appeals also denied a timely filed petition for rehearing or reconsideration *en banc* on November 6, 2002. This Court has jurisdiction to grant Petitioner a COA as provided in 28 U.S.C. § 2253(c) and to review the rulings below on certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The constitutional and statutory provisions at issue are reproduced in the Appendix as provided in Supreme Court Rule 14.1(f) (App. 31a-35a). The constitutional provisions are from Article III and

the Fifth and Sixth Amendments to the United States Constitution. The statutory provisions include Federal Rule of Criminal Procedure 12(b)(2), Federal Rules of Appellate Procedure 1(a)(1), 22(b)(1), and 47(a)(1), as well as sections of Title 18, U.S.C., concerning mail fraud (§ 1341), wire fraud (§ 1343), illegal monetary transactions (§ 1957), and racketeer influenced and corrupt organizations (§ 1962).[1] Third Circuit Local Appellate Rule 22.2 is also included as part of the Appendix.

STATEMENT OF THE CASE

1. In March 1997, a federal grand jury in the Eastern District of Pennsylvania returned a lengthy indictment charging Petitioner with multiple counts of mail and wire fraud as well as causing illegal monetary transactions in violation of 18 U.S.C. § 1957 and one count under the Racketeer and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(c), based on the mail and wire fraud predicates.

These charges arose out of the 1988 acquisition of an Ohio insurance company ("the Company") by a corporation owned by Petitioner's family. Subsequently, the insurer redomesticated to Pennsylvania and, after successfully operating for several years, was sold to a third party with regulatory approval. During the new buyer's ownership, the Company was taken over by the state insurance department and liquidated at a loss. App. 23a-24a.

Enlarging upon the explicit terms of the mail and wire fraud statutes, the indictment charged Petitioner with devising four fraudulent schemes to **"directly and indirectly"** obtain money and property. App. 24a. Each scheme defined "property" as state regulatory "licenses and the retention of [such] licenses, premiums from policyholders and customers, dividends, [and] fees." App. 25a. **The mailings and wirings allegedly sent by the insurance company for the "purpose of executing" these schemes were required state regulatory submissions made to obtain and retain its licenses to do business.**

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[1] The referenced rules and statutory provisions reproduced in the Appendix are those in effect at the time of trial or the filing of the appeal from the denial of the § 2255 motion, as appropriate, for several have subsequently been amended.

No communications to, for, or on account of policyholders or customers were charged. App. 24a-25a.

2. Pursuant to F.R.Crim.P. 12(b)(2), Petitioner filed a pretrial motion to dismiss the indictment for failure to "state an indictable offense." App. 23a. The motion contended state licenses do not rank as "property" for purposes of the mail and wire fraud statutes, thus rendering the charge of obtaining or retaining such licenses noncriminal conduct. App. 25a. Petitioner also argued that as the mail and wire fraud statutes are limited to the protection of property rights, not "indirect" consequences to third parties, the indictment was deficient for failing to allege the persons deceived by the alleged schemes to defraud were the same as the persons from whom money or property was sought.

3. The district court denied the motion to dismiss in an unreported opinion, 1997 WL 688815 (E.D.Pa., 10/23/97). It held (a) state regulatory licenses are property under *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir.), *cert. denied*, 498 U.S. 1017 (1990); and (b) because the mail and wire fraud statutes should "be construed broadly," convergence between the deceived and one from whom money or property was sought is not required. App. 27a-28a.

Alternatively, the court concluded that even if licenses are not property, the charged schemes were actionable under 18 U.S.C. § 1346, because false statements made to state agencies would have "the effect of depriving the [state] and it citizens of the honest services of its public servants who regulate" insurance companies. App. 29a. During trial, the government conceded the court's reliance on an "honest services" theory was misplaced, for the indictment did not allege any such scheme, and the jury was not instructed on that theory. However, the indictment was never redacted to remove the allegation Petitioner caused the Company to "indirectly" obtain money or property from third parties as a result of required correspondence sent to state agencies to obtain and renew regulatory licenses. App. 12a.

4. During trial, the evidence established that while certain policyholders incurred reduced benefits as a consequence of the state's

liquidation of the insurance company, **no policyholder or customer received, reviewed or relied upon the information contained in the charged mailings and wirings.** App. 9a. Instead, the government sought to prove through consultants and state officials the insurance company was rendered insolvent under state statutory accounting principles as a result of the 1988 acquisition, an impairment the charged mailings and wirings failed to disclose, thereby allowing the Company to continue its operations and receive premiums while paying dividends and fees. App. 18a.

The indictment also alleged, and the government argued at trial, the indirect consequences of having obtained and retained licenses to do business constituted the "specified unlawful activity" necessary to prove the charged unlawful monetary transactions. App. 13a. This it achieved by also adding the phrase "directly or indirectly" to the § 1957 counts, although like § 1341 and § 1343, these statutes contain no such inclusive language. App. 33a-35a.

When instructing the jury, the court did not review the factual conduct allegedly constituting the offenses charged. Instead, it provided each juror a copy of the indictment redacted to eliminate dismissed counts, but not the indirect loss theories or allegations of fraudulently obtaining and retaining state licenses. App. 12a. The jury convicted Petitioner of all counts presented for decision.

5. On appeal, Petitioner argued the evidence at trial was insufficient to establish a scheme to defraud but did not specifically challenge *Martinez*. App. 6a. That issue, however, was raised in his unsuccessful certiorari petition, which stated the error was of "jurisdictional significance [and] may be raised at any time."

6. While the case was on direct appeal, this Court published *United States v. Neder*, 527 U.S. 1, 22-23 (1999), holding that materiality is a core element of the federal fraud statutes, one that requires "concealment or misrepresentation [that] has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* The Court thus suggested that the mail and wire fraud statutes require convergence of

identity between the person deceived and the person from whom money or property is sought.[2]

7. Less than a year after Petitioner's certiorari petition was denied, this Court, overturning *Martinez*, unanimously held in *Cleveland v. United States*, 531 U.S. 12 (2000), the mail fraud statute does not encompass efforts to obtain or retain state regulatory licenses. Relying on *Neder* and *Cleveland*, Petitioner filed a timely § 2255 motion seeking vacatur of his conviction and sentence.

8. On June 7, 2001, the district court denied the § 2255 motion. Citing *Bousley v. United States*, 523 U.S. 614 (1998), it held that since *Cleveland* was decided after Petitioner's conviction became final and the licensure issue was challenged at trial but not noticed on direct appeal, he had procedurally defaulted his *Cleveland* claim. App. 5a. The court rejected Petitioner's jurisdictional challenge, characterizing *Cleveland* as merely a restriction on the scope of the statute, not a construction making noncriminal the specific factual conduct alleged in the indictment. App. 5a n. 4.

The court acknowledged *Bousley* might not apply and conceded *Cleveland* made noncriminal the factual conduct charged as to obtaining and retaining state licenses, making it certainly possible, if not probable, Petitioner was convicted by general verdict of a nonoffense, requiring vacatur under *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978), and *Griffin v. United States*, 502 U.S. 46 (1991). Nevertheless, the court proclaimed it was "absolutely certain" the jury had convicted on the charge of indirectly obtaining money, thereby negating *Yates* and *Griffin*. The court reached this remarkable result by discounting the fact the charged mailings and wirings alleged to have contained the material misrepresentations were addressed to state agencies, not, as *Neder* would require, to those purportedly deceived thereby into parting with money

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[2] As discussed *infra* at pp. 22-26, the courts of appeals are divided on the question of whether the mail and wire fraud statutes require a convergence of identity between the person deceived and the person from whom money or property is sought.

or property. The court pointed to the § 1957 convictions as special verdicts indicating the jury must have found money or property was the objective, for even were the jury "to have found a scheme to obtain [and retain] licenses, the ultimate purpose of such a scheme necessarily would have been to enable Stewart to obtain money or property" because "the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses." App. 18a (internal quotation marks omitted). This indirect consequence theory, however, not unlike that advanced to deny Petitioner's earlier Rule 12(b)(2) motion to dismiss, is contrary to *Neder*, but that case was ignored in the court's opinion despite being fully briefed.

Furthermore, it concluded that by charging fraudulent conduct, the indictment necessarily alleged a material misrepresentation which ultimately affected policyholders. The court thus rejected the convergence requirement contemplated by *Neder*, finding that the parties allegedly deceived by the charged mailings and wirings (state agencies) need not be identical to the parties allegedly victimized by such mailings and wirings (policyholders and customers). App. 19a-21a.

9. The court's order denying the § 2255 motion also refused Petitioner a COA without explanation, denying Petitioner an opportunity to exercise his substantive right to seek a COA from the court upon appealing its decision. App. 22a. The court also ignored its duty under F.R.App. P. 22(b)(1) to articulate "why a certificate should not issue," apparently following the contrary Third Circuit Local Appellate Rule 22.2, which provides: "If an order denying a petition under. . .§ 2255 is accompanied by an opinion. . .it is sufficient if the order denying the certificate references the opinion or report." App. 35a.

10. Pursuant to 28 U.S.C. § 2253(c)(1), Petitioner filed a timely request for a COA with the Third Circuit, which was denied without explanation. On November 6, 2002, the Third Circuit denied Petitioner's motion for panel rehearing or *en banc* reconsideration. Thereafter, this petition was timely filed.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL CONVICTION MUST BE SET ASIDE UNDER 28 U.S.C. § 2255 WHEN THIS COURT SUBSEQUENTLY CONSTRUES THE SUBSTANTIVE CRIMINAL STATUTE TO MAKE NONCRIMINAL THE SPECIFIC FACTUAL CONDUCT ALLEGED IN THE INDICTMENT.

The district court held that post-conviction decisions of this Court construing the mail and wire fraud statutes to make noncriminal the specific factual conduct alleged in the indictment did not require Petitioner's conviction to be set aside under 28 U.S.C. § 2255. This anomalous result warrants this Court's review. As it emphasized in *Davis v. United States*, 417 U.S. 333 (1974), when this Court construes a criminal statute to exclude the factual conduct alleged in the indictment, there "can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.* at 346-47. *See also Fiore v. White*, 531 U.S. 225 (2001) (one cannot "consistently with the Federal Due Process Clause [be] convicted for conduct that [a] criminal statute, as properly interpreted, does not prohibit").

The district court's rationale for denying relief under § 2255 is at odds with decisions of this Court and numerous courts of appeal. Its application of the procedural default doctrine articulated in *Bousley v. United States*, 523 U.S. 614 (1998), raises two issues that have divided the lower courts: (a) whether *Bousley* applies to cases not involving guilty pleas; and (b) whether, notwithstanding *Bousley*, the indictment's failure to allege criminal conduct voids a conviction under due to a lack of subject matter jurisdiction, structural error, or both. Moreover, the district court's reliance upon the ultimate effect or "bottom line" of Petitioner's alleged scheme as having the inevitable result of causing monetary loss to policyholders conflicts with the plain language of the mail and wire fraud statutes and with this Court's reasoning in *Yates* (general verdict must be set aside where one of

several possible bases for the verdict was legally inadequate "and it is impossible to tell which ground the jury selected").

In order to resolve these important issues, Petitioner respectfully requests a writ issue.

A. This Court's Decision in *Cleveland* and *Neder* Made Noncriminal the Specific Factual Conduct for Which Petitioner was Charged and Convicted.

The mail and wire fraud statutes criminalize schemes to defraud which deprive the deceived victim of "money or property." Less than a year after Petitioner's conviction became final with the denial of his certiorari petition, this Court held unanimously in *Cleveland* "§ 1341 does not reach fraud in obtaining a state or municipal license. . .for such a license is not 'property' in the government regulator's hands." Id., 531 U.S. at 20. Concluding that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities," the Court reasoned that "'unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* at 25 (*quoting Jones v. United States*, 529 U.S. 848, 858 (2000)).

Cleveland therefore invalidates those mail and wire fraud counts which allege Petitioner mailed or wired documents to state insurance departments for the purpose of obtaining and retaining state regulatory licenses. The district court acknowledged as much, stating that "[a]fter *Cleveland*, it is now clear that fraudulently obtaining licenses from state regulators does not amount to a violation of § 1341 and § 1343." App 10a.

Petitioner's convictions are also invalid under *Neder*, a case decided while Petitioner's direct appeal was pending. There, this Court held that the "materiality of a falsehood is an element of the federal mail fraud, wire fraud and bank fraud statutes." *Id.*, 527 U.S. at 25. Thus, in the instant case, it is impossible for the charged mailings and wirings sent by the Company to state agencies to obtain and retain regulatory licenses to constitute "material" falsehoods, since those agencies did not

part with "property" in return. *Cleveland*, 531 U.S. at 20.

In this context, it is important to observe that mail and wire fraud exist only if there are mailings or wirings made for the purpose of executing an alleged scheme to defraud. *Kann v. United States*, 323 U.S. 88, 95 (1944) (mail fraud reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law") (emphasis added). As Justice Scalia observed in *Schmuck v. United States*, 489 U.S. 705 (1989), the mail fraud statute, as construed by *Kann*,

> does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook. . .In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur -- nor even by one in which a mailing predictably and necessarily occurs. *The mailing must be in furtherance of the fraud.*"

Id. at 722-23 (Scalia, J., dissenting) (emphasis added); *see also United States v. Maze*, 414 U.S. 395, 405 (1974) ("Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be "for the purpose of executing such scheme or artifice. . .") (footnote omitted)[3]. Since *Cleveland* and *Neder* render noncriminal the mailings and wirings to state regulators charged against Petitioner, they cannot be "*part of the execution of the fraud* [and must] be dealt with by appropriate state law." *Kann*, 323 U.S. at 95.

The district court cited two reasons for denying Petitioner relief

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[3] *See also United States v. Green*, 786 F.2d 247, 255 (7th Cir. 1986) (Posner, J., dissent) ("It is tempting in a mail fraud case to think of the fraud as the important thing, and the use of the mails as a boring detail. But it is the mailing, not the fraud, that is the crime; each count of the mail fraud part of the indictment. . .is a separate mailing, not a separate fraud. And a mailing violates the statute only when it is made for a fraudulent purpose. The focus [should be] on the purpose *of the mailings;* if that purpose was not proved beyond a reasonable doubt to be fraud, [the defendant is] entitled to an acquittal") (emphasis in original).

under § 2255. First, citing *Bousley*, it concluded that while the *Cleveland* issue had been presented at trial, it had not on direct appeal and hence was procedurally defaulted. Second, even if incorrect as to procedural default, the court maintained Petitioner was not entitled to have his conviction set aside because "the ultimate purpose of [the] scheme necessarily would have been to enable Stewart to obtain money and property in the form of premiums from policyholders and customers, dividends, [and] fees," as "the bottom line of the scheme or artifice had the inevitable result of effecting monetary or property losses." App. 18a. Both of these conclusions are improper and raise important questions which warrant review.

1. While The Courts Of Appeal Are Divided As To Whether *Bousley*'s Procedural Default Analysis Controls Other Than In Guilty Plea Cases, It Should Not Apply When this Court Has Made Noncriminal The Factual Conduct Charged.

The district court held that under *Bousley*, Petitioner procedurally defaulted his *Cleveland* argument by failing to argue on direct appeal to the Third Circuit that licenses do not constitute property for purposes of the mail and wire fraud statutes. *Bousley*, however, addressed whether collateral attacks on guilty pleas should be barred on the basis of procedural default. Whether that ruling should apply equally in cases not involving a guilty plea or where the issue is contested at trial, but not appealed in light of binding contrary circuit precedent, has divided the courts of appeal and begs resolution by this Court.[4]

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[4] *Compare, e.g., Napier v. United States*, 159 F.3d 956 (6th Cir. 1998) (*Bousley* limited to guilty pleas) *and In Re Davenport*, 147 F.3d 605, 610 (7th Cir. 1998) (Posner, J.) (non-guilty plea case citing *Bousley*; "it would just clog the judicial pipes to require defendants, on pain of forfeiting all right to benefit from future changes in the law, to include challenges to settled law in their briefs on appeal and in post-conviction filings"), *with United States v. Ramos*, 147 F.3d 281 (3rd Cir. 1998) (extending *Bousley* to collateral challenges to jury instructions) (cited by district court below (App. 6a) as

There are two overarching considerations that militate against application of *Bousley* to cases where, as here, the Court's subsequent decision does not simply restrict a statute's reach, but makes the very conduct charged in the indictment noncriminal, a distinction the district court failed to appreciate.

a. The District Court Lacked Subject Matter Jurisdiction, Since The Specific Factual Conduct Alleged In The Indictment, Even If Proved By Overwhelming Evidence, Fails To State An Offense Against The United States.

Federal district courts have exclusive original jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. This past term, *United States v. Cotton*, -- U.S. –, 122 S.Ct. 1781 (2002), explained that today the often "elastic" term "jurisdiction" has come to mean "the courts' statutory or constitutional power to adjudicate the case," *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998), which "because it involves a court's power to hear a case, can never be forfeited or waived." *Id.* at 1785. *Cotton* went on to conclude that an indictment's failure to identify an offense element which affected the defendant's sentence but not his guilt on the underlying charge did not deprive the court of jurisdiction.

Petitioner's indictment, however, contains an even more fundamental defect, one not addressed in *Cotton*: allegations of particularized conduct which does not state a federal offense, no matter how overwhelming and uncontroverted the evidence of such conduct. In *United States v. Silber*, 370 U.S. 717 (1962), this Court was confronted with a situation not unlike this case. There, the indictment charged factual conduct indistinguishable from *Russell v. United States*, 369 U.S. 749 (1962). *Russell* had held such conduct not to constitute a federal offense while *Silber* was awaiting decision. Although Silber had filed a motion to dismiss in accordance with Fed.R.Crim.P. Rule 12(b)(2)

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applying to all collateral attacks) *and United States v. Sorrells*, 145 F.3d 744, 750 n. 4 (5th Cir. 1998) (jury instructions).

which had been erroneously denied, he had "not presented to the Court of Appeals and [had] not briefed or argued in this Court" that issue. *Id.* at 499. Nevertheless, this Court noticed the obvious error reflected by the indictment's failure to charge an offense and vacated the conviction, the same result indicated here in view of *Cleveland*.

A similar situation occurred in *Fiore v. White*, *supra*. There, the defendant was convicted under state law of conduct its supreme court later held not to be criminal, but had denied habeas corpus relief. Holding that this "Court's precedents make clear that Fiore's conviction and continued incarceration on [such a] charge violate[s] due process" which "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt," this Court set aside the conviction.

While neither *Silber* nor *Fiore* speak of a "jurisdictional" defect, it is clear that absent the indictment charging conduct which could if proven by evidence at trial constitute an offense against the United States, the court lacks any viable subject matter to place before the jury for decision. This deficiency, which can fairly be described as a lack of subject matter jurisdiction, is facially distinct from the defect considered in *Cotton*, where an offense was clearly charged, but a fact necessary to notice the defendant of all offense elements was absent.[5]

Recently, in *United States v. Peter*, 310 F.3d 709, 714-15 (11th Cir. 2002), where the appellant sought a writ of coram nobis based on *Cleveland*, the court made this same distinction. Observing that this Court in *Cotton* "did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges. . .describe conduct that is not proscribed by the charging

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[5] *Steel Company* recognized that "[d]ismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper [but] only when the claim is 'so insubstantial, implausible, *foreclosed by prior decision of this Court*, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.*, 523 U.S. at 89 (*quoting Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). Certainly, the decisions in *Neder* and *Cleveland* "foreclosed" the specific factual conduct charged in Petitioner's indictment from constituting an offense against the United States, requiring the resultant convictions be set aside for want of subject matter jurisdiction as defined in *Steel Company*.

statute," it concluded "a district court lacks jurisdiction when an indictment alleges only a non-offense." *Id.* at 714-15.

Peter also held that *Bousley*'s procedural default analysis was inapposite. While the indictment in *Bousley* alleged the offense for which the defendant was charged, it did not identify any specific facts by which the alleged conduct would be proven. By contrast, the indictment in *Peter*, as in this case, alleged the precise conduct held in *Cleveland* not to constitute mail fraud – making misrepresentations to a state agency to obtain and retain regulatory licenses. Thus, the government "affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute," "no matter how overwhelming" its evidence. *Id.* at 714. Consequently, "the district court had no jurisdiction to accept a plea to conduct that does not constitute mail fraud, and the doctrine of procedural default [did] not bar Peter's present challenge." *Id.*

Other courts of appeal have provided reasoning similar to *Peter*. *See United States v. Harris*, 149 F.3d 1304, 1308 (11th Cir. 1998) ("jurisdictional defects, by contrast, *cannot* be procedurally defaulted. As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress. We therefore cannot derive power to act from the actions of the parties before us. Consequently, the parties are incapable of conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default"); *United States v. Spinner*, 180 F.3d 514, 516 (3rd Cir. 1999); *United States v. Cook*, 997 F.2d 1312 (10th Cir. 1993) (jurisdictional issues can be raised on collateral attack); *Frank v. United States*, 914 F.2d 828 (7th Cir. 1990) (custody resulting from indictment that fails to state an offense violates laws of United States).[6]

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[6] *United States v. Hansen*, 906 F. Supp. 688 (D.D.C. 1995), is also instructive. There, the petitioner was convicted under the False Statements Act, 18 U.S.C. § 1001, for making false statements to the House of Representatives. At the time, the law clearly established that § 1001 prohibited false statements made to the House. *United States v. Bramblett*, 348 U.S. 503, 509 (1955). The petitioner did not challenge the Supreme Court's interpretation of *Bramblett* on direct appeal. After he completed his sentence and began serving an unrelated sentence, the Supreme Court overruled *Bramblett* in *Hubbard*

b. The Indictment's Failure To Allege An Offense Constitutes Non-waivable "Structural Error" Which Entitles Petitioner To Relief.

Assuming that the defect in the indictment is not jurisdictional, this case presents the opportunity to determine whether such a defect falls within the class of fatal flaws known as "structural errors" that "affect[] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). These errors "are so intrinsically harmful as to require automatic reversal." *Neder*, 527 U.S. at 7. In *Cotton*, this Court indicated its interest in this issue but ultimately decided that case on different grounds.

Silber, supra, supports the conclusion that when an indictment alleges specific factual conduct which is not an offense against the laws of the United States, relief is required even when the error is not raised on direct appeal. There, as here, the petitioner had objected to the insufficiency of the indictment in the district court but had not raised the

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v. United States, 514 U.S. 695 (1995), excluding false statements made to the House. The convicting court granted coram nobis relief to the petitioner and vacated his § 1001 conviction. The court observed that the indictment, which was read to the jury prior to deliberations, accused the petitioner of making false statements to the House. Thus, under *Hubbard*, "the indictment, the jury instructions, and the basis for the petitioner's conviction would be, and are, invalid. In 1984, the petitioner was convicted of conduct that, after *Hubbard*, is no longer criminal under § 1001." *Id.* at 695. Applying *Davis v. United States, supra*, the court held that *Hubbard* must be applied retroactively to eliminate the petitioner's conviction, neatly explaining the jurisdictional nature of its decision:

> For Justice Stewart and a majority of the *Davis* court, a conviction arising from acts that the law no longer made criminal left 'no room for doubt,' *id.*, that the failure to apply the law retroactively would 'inherently result in a complete miscarriage of justice.' *Id.* . .This Court holds that *Hubbard* should be applied retroactively; 'full retroactivity [is] a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place.' *United States v. Johnson*, 457 U.S. 537, 550 (1982).

Id. at 697 (emphasis added).

issue in the court of appeals or on certiorari. Nevertheless, this Court held *sua sponte* that reversal was necessary because the indictment failed to charge criminal conduct.

Silber thus defines a category of errors -- the failure to allege factual conduct amounting to criminal activity -- that is so fundamental as to require reversal in all cases. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra*, 499 U.S. at 310. Such errors "undermine [] the structural integrity of the criminal tribunal itself," *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986), and deprive an accused of "basic protections." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986). The rights violated by these errors "protect important values that are unrelated to the truth-seeking function of the trial," *id.* at 587 (Stevens, J., concurring in judgment), and their deprivation has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

The violation of the right not to be prosecuted under an indictment which fails to allege a crime readily satisfies the foregoing criteria. Prosecuting a defendant under such an indictment is an error that affects"the entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10. This error is as fundamental to the structure of the trial as other errors this Court has previously declared "structural." For instance, the "violation of the guarantee of a public trial required reversal without any showing of prejudice even though the values of a public trial may be intangible and unprovable in any particular case." *Id.* at 294-95 (*discussing Waller v. Georgia*, 467 U.S. 39 (1984)). If a defendant was denied counsel at trial or a grand jury free of discrimination, structural error mandates reversal. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *Whitus v. Georgia*, 385 U.S. 545, 553 (1967). Similarly, the right to be tried by an unbiased judge, in a community that has not been exposed to publicity highly negative to the defendant, are essential, and their denial constitutes structural error. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966). Just as with a trial by a biased judge, the conviction of a defendant for

noncriminal conduct charged in the indictment is an error of such magnitude that it "'infect[s] the entire trial process.'" *Neder*, 527 U.S. at 8.

This Court has previously determined that structural errors "require reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577 (citing *Chapman v. California*, 386 U.S. 18, 23 n. 8 (1967)). Structural errors "are so intrinsically harmful as to require automatic reversal (i.e., affect 'substantial rights') without regard to their effect on the outcome." *Neder*, 527 U.S. at 7. That principle carries particular force in the instant case, for the conduct alleged in the indictment cannot constitute mail or wire fraud, no matter how overwhelming the government's proof. For such structural errors as the failure to state a criminal offense, there "can be no room for doubt that. . .a complete miscarriage of justice [exists, presenting] exceptional circumstances that justify collateral relief under § 2255." *Davis*, 417 U.S. at 346-47.

Whatever the label that attaches -- "jurisdictional," "structural," or otherwise -- the failure of an indictment to allege specific factual conduct which if proven constitutes an offense against the United States must doom the charging instrument for not providing a viable issue that could support a valid conviction. Yet, the lack of clear guidance from the Court as to whether that deficiency compels vacatur of any resultant conviction, especially in the context of a habeas corpus proceeding where waiver and default issues predominate and can, as in the instant case, produce an improper result, recommend strongly the grant of a writ to resolve these important issues.[7]

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[7] Even if *Bousley* were applicable, it would not deprive Petitioner of relief. Petitioner's actual innocence entitles him to relief, because "in light of all the evidence, it is more likely than not that no reasonable jur[y] would have convicted him" had the jury been instructed as to *Cleveland*'s holding. *Bousley*, 523 U.S. at 623. The district court's contrary ruling -- based on allegedly "overwhelming evidence [Petitioner] devised schemes to defraud people of money and property other than licenses" because the jury "returned special verdicts requiring Stewart to forfeit specific amounts of money and pieces of property under the RICO and money laundering forfeiture laws" – simply begs the question. The RICO and illegal monetary transaction counts in the indictment which gave rise to these forfeitures were grounded exclusively on the "specified unlawful

2. The District Court's "Bottom Line" Justification For Denying Relief Under § 2255 Conflicts With The Plain Language Of The Mail And Wire Fraud Statutes And *Yates v. United States.*

The district court below concluded that Petitioner could be found guilty of mail and wire fraud if the alleged scheme to defraud "indirectly" realized money or property from policyholders through the "direct" device of obtaining and retaining licenses from state regulatory agencies. "The bottom line of the scheme or artifice," claimed the district court, "had the inevitable result of effecting monetary or property losses." App. 18a. This "indirect" concept mirrored the language repeated throughout the indictment that Petitioner "devised or intended to devise a scheme to defraud and to obtain money or property, **directly and indirectly**, by means of false and fraudulent pretenses and representations."

Since neither the mail nor wire fraud statutes contain the expansive phrase "directly and indirectly," both the indictment and district court misapplied §§ 1341 and 1343 to charge a nonoffense. This error was repeated in the § 1957 counts, which again employed the "directly and indirectly" phrase although such nowhere appears in these statutes. Had Congress intended these statutes to include "directly and indirectly," it would have inserted such long ago, for "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926); *see also United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002) ("a court should not read words into a statute that are not there").[8]

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conduct" charged in the mail and wire fraud counts. Since the mail and wire fraud convictions must be set aside under *Cleveland*, so, too, must the RICO and § 1957 verdicts.

[8] The "directly and indirectly" concept also conflicts with this Court's holding in *McNally v. United States*, 483 U.S. 350 (1987). There, the government charged the defendants with a patronage scheme that defrauded Kentucky citizens of the honest services of public officials, thereby "directly and indirectly" permitting defendants to

Cleveland makes clear this Court would not approve such "sweeping expansions of federal criminal jurisdiction" such as "directly and indirectly" in the absence of "a clear statement by Congress." *Id.*, 531 U.S. at 24. Further, as *Cleveland* observes, the rule of lenity counsels against broad constructions of the mail and wire fraud statutes:

> [W]e have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971). This interpretive guide is especially appropriate in construing § 1341 because, as this case demonstrates, mail fraud is a predicate offense under RICO, 18 U.S.C. § 1961(1) (1994 ed., Supp. IV), and the money laundering statute, § 1956(c)(7)(A).

Id. at 25. This logic is especially pertinent in the instant case, since Petitioner's convictions under RICO and the money laundering statute are grounded upon his mail and wire fraud convictions.[9]

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obtain money and property. *Id.* at 354 n. 4. Presented with the opportunity to construe the mail fraud statute broadly, this Court concluded that the mail fraud statute is "limited in scope to the protection of property rights" and does not encompass the right to honest services or the resultant indirect monetary consequences. *Id.* at 360. *McNally* makes clear that this Court eschews expansive constructions of the mail and wire fraud statutes such as would occur by injecting "directly and indirectly" into their construction. *Id.* ("if Congress desires to go further, it must speak more clearly than it has").

[9] The district court's attempt to sidestep *Cleveland* by claiming "overwhelming evidence" of Petitioner's guilt misses the mark. App. 8a. Here, as a matter of law, the mailings and wirings cannot be fraudulent under §§ 1341 and 1343. *Cleveland*. The only "overwhelming evidence" in this case is that of mailings and wirings to state regulatory agencies, totally innocuous conduct under §§ 1341 and 1343. *Id.* The cases relied upon by the district court to demonstrate *Yates'* inapplicability, *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988), and *United States v. Osser*, 864 F.2d 1056 (3d Cir. 1988), are materially distinguishable from this case. Both of these decisions arose from prosecutions under 18 U.S.C. § 1346 for deprivation of honest services. In each case, the government was both deceived and victimized by the defendant, losing money or property, a *McNally* touchstone. In the present case, however, the government prosecuted Petitioner solely under 18 U.S.C. §§ 1341 and 1343 and expressly declined to

Moreover, the district court's "direct/indirect" analysis conflicts with this Court's holding in *Yates v. United States*, 354 U.S. at 312, that where one of several possible bases for a general verdict was legally inadequate, "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." The district court repeatedly instructed the jury to review the superseding indictment, which was permeated with allegations of mailings and wirings to state agencies for the purpose of "obtaining and retaining insurance licenses" the very accusations that *Cleveland* condemns. These allegations doubtless formed the basis for the jury's general verdict. Whether Mr. Stewart's conviction could conceivably have rested upon other grounds is of no importance, because the mere possibility he stands convicted of an act that the law does not make criminal requires vacatur of his convictions. *See Yates*, 354 U.S. at 312[10]; *Zant v. Stephens*, 462 U.S. 862, 881 (1983) (*citing Stromberg v.*

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charge Petitioner under § 1346. Nor, as a matter of law, did Petitioner's indictment validly charge him with victimizing the government by causing it to part with money or property.

[10] *Griffin v. United States*, 502 U.S. 46, 56 (1991), explains that *Yates* requires a general verdict be set aside when one possible basis for conviction might be "legal error", that is, a "mistake about the law." *Id.* at 59. "Jurors," *Griffin* observed,

> are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Id. *Griffin* also distinguished "mistakes about the law," which require vacatur of a general verdict, from "mere mistakes about the weight or factual import of the evidence," which do not.

Judge Easterbrook provides a useful analysis of *Yates* and *Griffin* which

California, 283 U.S. 359, 367-68 (1931)) ("a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground"). If the rule in *Yates* is violated, the court must vacate the defendant's conviction either on direct appeal or at the § 2255 stage. *Ingber v. Enzor*, 841 F.2d 450, 456 (2d Cir. 1988) (*citing Stromberg*) (observing in the course of granting post-conviction relief "where there is doubt as to whether a conviction is predicated on an impermissible ground, that doubt must be resolved in the defendant's favor and the conviction vacated"). More recently, in *Keating v. Hood*, 191 F.3d 1053 (9th Cir. 1999), the court observed that *Yates*' reasoning applies in habeas cases "even when the evidence supporting the legally correct theory was 'very

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underscores *Yates*' applicability to the instant case:

> *Griffin* and *Yates* deal with cases in which one theory of culpability is flawed while another is sound, and the jury does not reveal which theory it adopted. **In [the *Yates*] set of cases the flaw is legal. A jury may be told, for example, that the law forbids the doing of either A or B, and the verdict shows that the jury found that the defendant did one of these things, but not which. If one of the two is not a crime, *Yates* concludes, a new trial must be held. For all the court can tell, the jury found that the defendant committed the act that the law does not condemn.** In the [*Griffin*] set of cases the flaw is in the proof. The jury is told correctly that the law forbids the doing of either A or B, and the record permits a rational trier of fact to find that the defendant did A, but it does not permit a conclusion that he did B. In these cases, *Griffin* holds, the verdict is sound. A reviewing court should assume that the jury found that the defendant committed the act that the facts support; anything else would attribute irrationality to the jury. Juries apply to the facts of the case the law articulated by the judge. **Courts assume that juries can distinguish good proof from bad, but juries do not separate good *law* from bad. That's the line between *Yates* and *Griffin*. When the facts could justify a conclusion that the defendant did both A and B, but only A is illegal, a court has no reason to believe that the jury found A, and a new trial ensues.**

Tenner v. Gilmore, 184 F.3d 608, 611 (7th Cir. 1999) (emphasis added). Here, the jury was permitted to convict Petitioner on the basis of the legally inadequate theory that state insurance licenses are "property", i.e., a "mistake about the law," the very situation proscribed in *Yates*.

strong' and the state did not argue the legally erroneous theory to the jury, [for] the conviction must be reversed when it is not possible to determine whether the jury relied upon the erroneous theory to convict the defendant." *Id.* at 1053.

Numerous circuit courts have vacated convictions under *Yates* and *Zant*. *See, e.g.*, *United States v. Qualls*, 140 F.3d 824, 829 (9th Cir. 1998) (en banc), *vacated on other grounds*, 119 S.Ct. 398 (1998); *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998); *United States v. Fulbright*, 105 F.3d 443 (9th Cir.), *cert. denied*, 520 U.S. 1236 (1997); *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995); *Suniga v. Bunnell*, 998 F.2d 664, 667, 669-70 (9th Cir. 1993) (habeas case).[11]

To resolve the conflict between the "direct/indirect" analysis in the instant case and this Court's holdings in *Cleveland*, *Neder* and *Yates*, Petitioner respectfully requests a writ should issue.

II.

TO STATE AN OFFENSE UNDER THE MAIL AND WIRE FRAUD STATUTES, AN INDICTMENT MUST ALLEGE THE PARTY FROM WHOM MONEY OR PROPERTY IS SOUGHT BE THE SAME AS THE PARTY DECEIVED BY A MATERIAL MISREPRESENTATION.

This Court's observation in *McNally* that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive *them* of *their* money or property," *id.* at 356 (emphasis added), has spawned a persistent disagreement among the courts of appeal as to whether there must be a convergence of identity between the party deceived and the party from whom money or property was sought. Shortly after *McNally*, in *United States v. Evans*, 844 F.2d 36, 39 (2d

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[11] In *United States v. LeVeque*, 283 F.3d 1098 (9th Cir. 2002), and *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), the Ninth and Eleventh Circuits vacated mail fraud convictions utilizing logic fully consonant with *Yates*. Both courts reasoned it was impossible to tell from the general verdict whether the jury found the defendant guilty of obtaining money (a valid basis for conviction) or regulatory licenses (an invalid basis).

Cir. 1988), the court, noting *McNally*'s linkage of the deceived and the victim, a common law feature of "fraud," allowed in dicta: "If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property." This concept of convergence, requiring the alleged deceived and victim to be identical, was given full voice in *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988), which held that "instructions on the elements of mail fraud must require the jury to find that the victim of the scheme itself must be defrauded of money or property."

Numerous courts have endorsed convergence. *See Monterrey Plaza Hotel v. Local 483*, 215 F.3d 923, 926 (9th Cir. 2000) ("the mail and wire fraud statutes §§ 1341 and 1343, prohibit use of the mails and wires to *obtain* money or property *from the one who is deceived*") (emphasis in original); *United States v. Guadagna*, 183 F.2d 122, 129-30 (2d Cir. 1999) (adopting *Evans*' observation that deceit alone is insufficient, for it "must be coupled with a contemplated harm to the victim"); *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) ("this means not only that a defendant must knowingly make a material misrepresentation or knowingly omit a material fact, but also that the misrepresentation or omission must have the purpose of inducing the victim of the fraud to part with property or undertake some action that he would not otherwise do absent the misrepresentation or omission"); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) ("intent must be to obtain money or property from the one deceived"); *Shelton*; *Evans*; *see also Mylan Labs, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1074 (D. Md. 1991) ("the better rule is to require that the person allegedly deceived by the misrepresentations be the person injured by the misrepresentations. This convergence of identity seems inherent in the idea of fraud as provided in the fraud statutes and defined by the Supreme Court in *McNally*").

Convergence, however, has not been universally accepted. In *United States v. Cosentino*, 869 F.2d 301 (7th Cir.), *cert. denied*, 492 U.S. 908 (1989), the court concluded that providing deceptive financial statements to a state regulatory agency was sufficient to sustain a mail fraud conviction although the losses were incurred by the Company's

customers, because "the scheme permitted the [company] to remain in business past the point it would have had the [state agency] been aware of the defendants' activities and that additional time allowed the defendants more time to take [property or] money."[12] In *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir.), *cert. denied*, 522 U.S. 938 (1997), the defendant argued on the basis of *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), *cert. denied*, 500 U.S. 921 (1991), that because fraudulently obtaining a license did not state a mail fraud offense (the argument subsequently accepted by this Court in *Cleveland*), misrepresentations in the statements sent to regulatory agencies alone could not be actionable. The Eighth Circuit rejected that argument, observing that whether convergence is required "is a difficult question, and one on which the case law does not admit of easy reconciliation," *Id.*, 114 F.3d at 767, but believed *Cosentino* reached the right result and affirmed the conviction. *See also United States v. Christopher*, 142 F.3d 46, 53 (1st Cir.), *cert. denied*, 525 U.S. 1054 (1998) (concluding its prior decision in *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), did not compel a convergence analysis and therefore adopting the reasoning in *Blumeyer*).

In this case, none of the mail and wire fraud counts in the indictment alleged that the target of the mailing or wiring was both a person who was deceived and a person from whom Petitioner sought money or property. Thus, under the convergence principle, the indictment fails to state an offense, entitling Petitioner to relief under § 2255[13].

The district court rejected the necessity of convergence by

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[12] *But see Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) (specifically rejecting theory advanced in *Cosentino*).

[13] For the reasons provided above on pp. 11-17, Petitioner retains the right to raise the convergence issue notwithstanding the procedural default doctrine. In addition, Petitioner has not defaulted this issue for the reason that this Court decided *Neder* during his direct appeal, entitling him to rely upon its teaching during postconviction proceedings. *Teague v. Lane*, 489 U.S. 288, 301 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 378 (1987).

concluding that the parties allegedly harmed (policyholders and customers) need not be identical to the parties who received the charged mailings and wirings (state agencies). Under *Neder* and *Cleveland*, however, such scenarios do not constitute mail or wire fraud. In *Neder*, this Court construed the phrase "scheme or artifice to defraud" found in both the mail and wire fraud statutes as requiring proof of materiality, which was then defined as "[a] concealment or misrepresentation [that] has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed."[14] *Id.*, 527 U.S. at 16 (citations omitted). *Neder* thus requires a "material misrepresentation" be *addressed to the one intended to be deceived*, i.e., the state regulatory agencies which granted and renewed the Company's regulatory licenses. On the other hand, the charged mailings and wirings made to obtain and retain regulatory licenses cannot be material with regard to policyholders or customers, since the mailings and wirings were neither addressed to nor received by these parties.[15]

Similarly, the district court's analysis would moot *Cleveland*,

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[14] This definition of materiality is rooted in the common law. Section 538 of the Restatement (Second) of Torts, the "most widely accepted distillation" of the common law, *Field v. Mans*, 516 US 59, 70 (1995), provides that "a matter is material if: (b) the maker of the misrepresentation knows or has reason to know its recipient regards or is likely to regard the matter as important in determining his choice of action." *Neder* adopts § 538's definition of materiality. *Id.*, 527 U.S. at 22, n. 5. This provision clearly contemplates the recipient intended by the maker, not third parties, act upon "material" misrepresentations. As such, it precludes the mail and wire fraud statutes from applying to indirect or consequential effects.

[15] The indictment also charged Petitioner with violating the mail and wire fraud statutes by causing the Company to pay "dividends and other fees." Yet, the mailings and wirings which allegedly made the material misrepresentations for the purpose of executing the purported scheme to deceive were communications originated by the Company. Thus, to accept the district court's "bottom line" or ultimate effect analysis would necessarily require the Company to have deceived itself into paying dividends and fees. As the district court itself recognized in a related civil case, *Kaiser v. Stewart*, 1997 WL 476455, *6 (E.D.Pa. 1997), such a concept is implausible: "Obviously, [the Company] could not have been defrauded to the extent it originated the mailings or wires."

since the government could escape its reach through the same device utilized by the district court: an assertion the defendant obtained money and property from third parties by obtaining or retaining state-issued licenses. For example, if one were to fraudulently obtain a video poker license as charged in *Cleveland*, the government need only allege its customers were harmed because their gambling losses occurred as a consequence of the scheme to defraud the state agency of a license to operate video poker machines.

To resolve the continuing deep division of authority within the courts of appeal as to whether the deceived and victim need be the same to make out the offenses of mail and wire fraud, and to further clarify the mail and wire fraud statutes[16], this Court should issue the writ.

III

A COURT OF APPEALS CANNOT, CONSISTENT WITH FEDERAL RULE OF APPELLATE PROCEDURE 22(B)(1), ADOPT A LOCAL RULE EMPOWERING DISTRICT COURTS TO DECLINE A COA BEFORE AN APPEAL IS FILED OR COA REQUESTED, AND WITHOUT EXPLAINING WHY THE COA DID NOT ISSUE.

Third Circuit Local Appellate Rule 22.2 contrasts markedly with the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[17] and F.R.App.P. 22(b)(1) in permitting the district court to deny a COA, without explanation, at the same time it denies relief under 28 U.S.C. § 2255. By authorizing a procedure that abridges the independent COA review required of the district judge who denied the § 2255 motion, the local rule deprives an appealing party his substantive right to receive a

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[16] *See United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999) ("A century of interpretation of the [mail fraud] statute has failed to still the doubts of those who think it dangerously vague").

[17] Pub.L.No. 104-132, April 24, 1996.

"first level" review which either grants a COA or explains its denial.[18] To bring the Third Circuit's rule into conformity with the AEDPA and F.R.App.P. 22(b)(1), and to protect Petitioner's due process rights under those provisions, a writ should issue.

The AEDPA reformed federal habeas corpus practice by substantially limiting appeals through a procedure whereby an adverse § 2255 decision could be appealed to the court of appeals only if a "circuit justice or judge" issues a COA attesting to a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1).

The role of the district judge in the COA process is prescribed in F.R.App.P. 22(b)(1) as follows:

> If an applicant files a notice of appeal, the district judge who rendered the judgment *must* either issue a certificate of appealability or state why a certificate should not issue. The district court *must* send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. (emphasis added)

The use of the mandatory "must" in the amended rule, replacing the instructive "shall" in the prior version clearly reflects an intent to foreclose any deviation from its terms. This bifurcated procedure, requiring the merits and COA determinations to be undertaken independently, well balances the critical function served by the COA with the AEDPA's requirement all § 2255 motions be filed with the trial court in the first instance.

Most appellate courts have followed Rule 22(b)(1) faithfully.[19]

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[18] *See Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) ("The absolute power of a district judge to allow a habeas appeal by granting a certificate of probable cause implies that the right to a 'first level' ruling is substantive"); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) ("we must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus").

[19] The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, District of Columbia and Federal Circuits have not adopted any local rules enlarging upon F.R.App.P. 22(b)(1), while the First, Second and Eleventh have merely conformed their practices to the new

Third Circuit LAR 22.2, however, directly contradicts its clear mandate by authorizing the district court to deny a § 2255 petitioner his right to an independent COA determination and the explanation of an adverse result, stating:

> At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue. . .If an order denying a petition under §2254 or §2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

In the instant case, the district court erroneously followed Third Circuit LAR 22.2 instead of the bifurcated procedure mandated by F.R.App.P. 22(b)(1), denying Petitioner a COA at the same time it adversely decided the § 2255 motion without explanation as to why a COA did not issue.

Since this procedure violated F.R.App.P. 22(b)(1), the local rule should be stricken. *See* F.R.App.P. 1(a)(1) (federal rules of appellate procedure "govern procedure in the United States courts of appeal"); F.R.App.P. 47 (a)(1) (local rules "must be consistent [with] Acts of Congress and rules adopted under 28 U.S.C. § 2072").

Supreme Court Rule 10 explains that a writ of certiorari is appropriate where, as here, a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court." To provide Petitioner his substantive right to a "first level" COA ruling, one precluded by the nonconforming

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rule. *See also United States v. Mitchell*, 216 F.3d 1126, 1130 (D.C. Cir. 2000); *Muniz v. Johnson*, 114 F.3d 43, 45-46 (5th Cir. 1997); *but see Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002) (permitting the district judge to issue or deny a COA when ruling on the § 2255 motion).

Third Circuit LAR 22.2, the writ should issue.[20]

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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February 4, 2003

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[20] *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), in establishing the standard for determining whether a COA should issue, notes approvingly the observation in *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983), that "obviously the petitioner need not show that he should prevail on the merits [since h]e has already failed in that endeavor." Yet, the requirement of Third Circuit LAR 22.2's requirement that the district court make the COA determination coincident with its denial of habeas corpus relief masks, if not obliterates, this critical distinction to Petitioner's substantial prejudice.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

C.A. No. 01-3048
United States Court of Appeals for the
Third Circuit
August 29, 2002

Present: Sloviter, Rendell, and Fuentes, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
(2) Appellant's memorandum of law in support thereof;
(3) Appellee's memorandum of law in opposition thereto;
(4) Appellant's reply thereto;
(5) Appellant's February 26, 2002 letter pursuant to Federal Rule of Appellate Procedure 28(j);
(6) Appellant's May 10, 2002 letter pursuant to Federal Rule of Appellate Procedure 28(j);
(7) Appellee's May 24, 2002 letter response thereto

in the above-captioned case.

ORDER

The foregoing is denied.

BY THE COURT:

_____
J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

C.A. No. 01-3048
United States Court of Appeals for the
Third Circuit
November 6, 2002

Present: Becker, Chief Judge, Sloviter, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Ambro, Fuentes, and Smith, Circuit Judges

SUR PETITION FOR REHEARING EN BANC

The Petition for Rehearing filed by Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT:

_____
J.

UNITED STATES OF AMERICA
v.
ALLEN W. STEWART

Criminal Action No. 96-583
Civil Action No. 00-6299
United States District Court for the
Eastern District of Pennsylvania
June 7, 2001
(151 F. Supp. 2d 572)

Before the court is the motion of Allen W. Stewart ("Stewart") under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence.

Stewart was convicted by a jury in December, 1997 of 135 counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, as well as federal mail fraud, wire fraud, and money laundering statutes. 18 U.S.C. §§ 1341, 1343, 1957. The charges arose out of Stewart's involvement in a complex scheme to loot Summit National Life Insurance Company ("Summit") and Equitable Beneficial Life Insurance Company ("EBL"). The jury also determined that certain of Stewart's assets were subject to forfeiture under the RICO and money laundering laws. On August 13, 1998 Stewart was sentenced to 15 years imprisonment, and an order of restitution in the amount of $ 60.1 million was entered against him. His conviction and sentence were subsequently affirmed by the Court of Appeals, *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999), and the Supreme Court thereafter denied certiorari. *Stewart v. United States*, 528 U.S. 1063, 145 L. Ed. 2d 512, 120 S. Ct. 618 (1999).

I.

Stewart's timely collateral attack first challenges his convictions

for mail fraud under 18 U.S.C § 1341[1] and wire fraud under 18 U.S.C. § 1343[2]. To support his argument that these convictions must be vacated, Stewart relies on *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000), decided after the Supreme Court denied certiorari in this case, and thus after his conviction became final. *Cleveland* held that licenses issued by states are not property within the meaning of the federal mail fraud statute[3]. Since the mail fraud statute "requires the object of the fraud to be 'property' in the victim's hands," the Court concluded that the use of fraud to obtain a state license does not fall within the ambit of § 1341. 121 S. Ct. at 374. Thus, even though "licensees may have property interests in their licenses," using a scheme or artifice to defraud in order to obtain a license from a state regulator does not constitute a violation of § 1341. Id.

Before turning to the merits of Stewart's *Cleveland* argument, we

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[1] Title 18 U.S.C. § 1341 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

[2] The wire fraud statute is identical to the mail fraud statute except that the wrongdoer "transmits or causes to be transmitted by means of wire, ... any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343.

[3] While Cleveland dealt only with the federal mail fraud statute, it is also applicable to the federal wire fraud statute. *See United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977).

must decide whether his claim is procedurally defaulted[4]. While Stewart raised the issue of licenses not constituting property under the mail and wire fraud statutes prior to trial and in his certiorari petition, he did not assert it during his direct appeal. The Supreme Court most recently addressed procedural default in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). *See also United States v. Frady*, 456 U.S. 152, 167, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982). *Bousley* made clear that the procedural default rule applies to claims arising under decisions like *Cleveland* which hold "that a substantive federal criminal statute does not reach certain conduct." 523 U.S. at 620. If such a claim has been procedurally defaulted because it was not raised on direct review, "the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Id.* at 622 (citations omitted).

"Cause" for failing to raise a claim exists if the claim had "no reasonable basis in existing law." *Reed v. Ross*, 468 U.S. 1, 15, 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984). In other words, a defendant may demonstrate "cause" for his procedural default if an issue was "so novel that its legal basis [was] not reasonably available to counsel." Id. Stewart's *Cleveland* claim is not "so novel" as to constitute cause. *See Bousley*, 523 U.S. at 622. At the time of Stewart's trial and appeal the question whether licenses were property under § 1341 was a hotly contested issue subject to great debate in the lower courts. Many

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[4] We note that Stewart attempts to couch his *Cleveland* argument as a nonwaivable jurisdictional defect of which there can be no procedural default. We disagree with this characterization. In *Cleveland* the Court interpreted the term "property" in a different, more restrictive manner than some lower courts had. In that sense it is analogous to cases such as *Bailey v. United States*, 516 U.S. 137, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995), where the term "using" a firearm in 18 U.S.C. § 924(c)(1) was redefined, and *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), where the reach of the mail fraud statute was restricted to exclude an intangible rights theory. Courts addressing the application of *Bailey* and *McNally* in post-conviction proceedings have not excused procedural default unless the test for doing so has been met. *See, e.g., Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998); *United States v. Osser*, 864 F.2d 1056 (3d Cir. 1988); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988).

circuits had already reached the conclusion licenses were not property for purposes of the mail fraud statute. *See United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998); *United States v. Schwartz*, 924 F.2d 410, 418 (2d Cir. 1991); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988). Several circuits, including our Court of Appeals, had made the opposite determination. *See United States v. Salvatore*, 110 F.3d 1131, 1138 (5th Cir. 1997); *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir. 1990). Clearly then, the basis of the claim was not novel at the time of Stewart's direct appeal.

Stewart notes that it was because of the binding authority of the Third Circuit's decision in *Martinez* that he did not raise the license issue on direct appeal. In other words, he contends it would have been futile for him to do so. The Supreme Court has explicitly stated that this position is unavailing because "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousley*, 523 U.S. at 623 (*quoting Engle v. Isaac*, 456 U.S. 107, 130 n.35, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)). Since "a § 2255 movant cannot show 'cause' for failing to make ... [an] argument on direct appeal by demonstrating that circuit law at the time would have made any such argument futile," Stewart has no "cause" for his default. *United States v. Ramos*, 147 F.3d 281, 287 (3d Cir. 1998).

Stewart also argues that his counsel was ineffective for failing to raise the *Cleveland* issue on appeal. "It is now well-established that a successful claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, ... satisfies the 'cause' prong of a procedural default inquiry." *United States v. Garth*, 188 F.3d 99, 107 (3d Cir. 1999). In order to establish a claim of ineffective assistance of counsel under *Strickland* that rises to the level of constitutional error, a petitioner must prove: (1) counsel's performance "fell below an objective standard of reasonableness," that

is, that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) the deficient representation prejudiced petitioner, that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687-88.

It is well settled that when choosing which issues to raise on appeal, "an exercise of professional judgment is required. Appealing losing issues 'runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions.'" *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (quoting *Jones v. Barnes*, 463 U.S. 745, 753, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). Only in rare cases will failure to raise an issue on appeal constitute ineffective assistance of counsel because the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986) (internal quotations omitted).

Stewart's trial lasted approximately six weeks. Numerous pre-trial, trial, and post-trial motions were made and ruled on by this court. There existed a plethora of issues that could have been appealed. Stewart's counsel chose to pursue 10 issues on appeal in a lengthy 85 page brief. Viewed in light of Third Circuit law at the time, the license issue was weak and unlikely to prevail. *See Martinez*, 905 F.2d at 715. Thus, the decision not to pursue it clearly "fell within the 'wide range of professionally competent assistance' required under the Sixth Amendment to the Federal Constitution." *Smith*, 477 U.S. at 536 (quoting *Strickland*, 466 U.S. at 690).

Furthermore, "there is no general duty on the part of defense counsel to anticipate changes in the law," *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), and failure to do so does not constitute ineffective assistance of counsel. *See Sistrunk*, 96 F.3d at 672; *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990). Keeping in mind that "[a] fair assessment of attorney performance

requires that every effort be made to eliminate the distorting effects of hindsight," we find that the failure of Stewart's counsel to anticipate the Supreme Court's ruling in *Cleveland* does not amount to ineffective assistance of counsel and that Stewart has therefore failed to show "cause" for the procedural default. *Strickland*, 466 U.S. at 688.

The only way which Stewart's lack of "cause" for his procedural default can be excused is if he can establish "actual innocence." *Bousley*, 523 U.S. at 623. To establish "actual innocence" a defendant must show that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* "Simply stated, 'actual innocence' ... means that the person did not commit the crime." *Garth*, 188 F.3d at 107 (internal quotations omitted). If a defendant can demonstrate "actual innocence," then the court can consider the merits of the defaulted claim. *Id.* at 107-08.

Stewart simply cannot take advantage of this exception, reserved for a "fundamental miscarriage of justice." *Herrera v. Collins*, 506 U.S. 390, 404, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). There was overwhelming evidence presented at trial that Stewart devised schemes to defraud people of money and property other than licenses, including premiums from policyholders and customers, dividends, and various types of fees. Furthermore, the jury clearly found that property other than licenses was obtained through his schemes because it returned special verdicts requiring Stewart to forfeit specific amounts of money and pieces of property under the RICO and money laundering forfeiture laws. Given the above, Stewart clearly cannot meet the *Bousley* standard, which requires him to show that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." 523 U.S. at 623. He has not established that he is "actually innocent" of his mail and wire fraud convictions and has thus procedurally defaulted his *Cleveland* claim.

II.

Even if we are incorrect that Stewart has procedurally defaulted

his *Cleveland* claim, he cannot succeed on the merits. Stewart argues that he is entitled to relief under *Cleveland* because the superseding indictment under which he was charged defined property under the mail and wire fraud counts to include licenses among other items. As a result, Stewart maintains his conviction was flawed since licenses are not property under the mail and wire fraud statutes.

Stewart was charged in a lengthy and detailed 157 count superseding indictment[5]. Count 1 alleged a RICO violation and charged that Stewart had committed four racketeering acts, or schemes. As recorded on the verdict sheet, the jury found that Stewart committed all four schemes alleged, as well as all of their predicate acts. Racketeering Act No. 1 alleged a scheme to conceal the insolvency of Summit in order to permit Stewart to continue to control and operate it. Act No. 1 cited 17 predicate acts of mail fraud which Stewart allegedly committed[6]. Racketeering Act No. 2, which incorporated mail fraud counts 2 through 19 as its predicate racketeering acts, charged a scheme to loot Summit and EBL of their valuable assets. Act No. 3, which incorporated wire fraud counts 24 through 32, alleged a scheme to deceive regulators regarding reinsurance. Finally, Act No. 4 charged that the defendant devised and executed a scheme to inflate Summit's financial statements with an overvalued promissory note. It relied upon mail fraud counts 33 through 120 as its predicate racketeering acts[7].

The superseding indictment charged that through the operation

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[5] Counts 3, 5-13, 15, 20, 21, 23, 34, 35, 74, 75, 119 and 120 were removed from the case prior to its submission to the jury.

[6] During the trial and before submission of the case to the jury we struck predicate acts 1C-1E, 1G-1O and 1W. *United States v. Stewart*, 1998 U.S. Dist. LEXIS 8275, Crim. A. No. 96-583, 1998 WL 372426 (E.D. Pa. June 2, 1998); N.T., Dec. 16, 1997, at 27.

[7] Counts 121 through 155 of the superseding indictment alleged violations of the federal money laundering statute during the operation of the looting scheme described in counts 2 through 23. The superseding indictment also included a RICO forfeiture count and a money laundering forfeiture count.

of the above schemes Stewart obtained money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting and management fees, and an inflated sales price for Summit. See Superseding Indictment at 17, ¶ 52; 31, ¶ 34; 42, ¶ 25; 47, ¶ 13[8]. After Cleveland, it is now clear that fraudulently obtaining licenses from state regulators does not amount to a violation of § 1341 and § 1343. Stewart argues that even a mere possibility that the jury convicted him under the legally deficient theory that state insurance licenses constitute property under the mail and wire fraud statutes mandates that his convictions be vacated under the authority of *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).

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[8] The relevant paragraphs of the superseding indictment are reproduced below.

RICO Count 1 ¶ 52: "It was part of the scheme that by all the foregoing the defendant Allen W. Stewart and other entities he controlled would and did obtain money and property, including Summit, the funds to purchase Summit, licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, money from investors, legal fees and other fees."

Mail Fraud Counts 2-19 ¶ 34: "It was part of the overall scheme described above that, in addition to the money and property described above, the defendant Allen W. Stewart, and others would obtain, directly and indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales price for the companies."

Wire Fraud Counts 24-32 ¶ 25: "It was part of the scheme that by all the foregoing the defendant Allen W. Stewart and other entities would obtain money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, and an inflated sales price for Summit National Life Insurance Company."

Mail Fraud Counts 33-124 ¶ 13: "It was part of the scheme that by the foregoing, the defendant Allen W. Stewart and other entities would obtain money and property, licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, and attorney fees and an inflated sale price for Summit."

In *Yates* a jury convicted the defendants of conspiring to violate the Smith Act which prohibited (1) advocating the duty and necessity of overthrowing the United States Government and (2) organizing a group as the Communist Party. 354 U.S. at 300. On appeal the defendants argued that the court improperly instructed the jury on the meaning of the term "organize," which resulted in their conviction of a crime barred by the statute of limitations. Since the Communist Party came into being in 1945, but the indictment was not forthcoming until 1951, the three-year statute of limitations had expired on the "organizing" charge, and defendants therefore could not be found guilty of it. *Id.* at 312. The Government contended that even if the "organizing" charge was infirm, the conviction should stand because the jury also found defendants guilty of the "advocacy" charge. The Supreme Court disagreed, explaining that it had "no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy." *Id.* at 311-12. The Court held that "in these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

Yates was an extension of *Stromberg v. California*, 283 U.S. 359, 368, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), where the Supreme Court held that if any of the grounds upon which a general verdict rests "is invalid under the Federal Constitution, the conviction cannot be upheld." It marked the first time that the Supreme Court applied *Stromberg* "to a general verdict in which one of the possible bases of conviction did not violate any provision of the Constitution but was simply legally inadequate (because of a statutory time bar)." *Griffin v. United States*, 502 U.S. 46, 55, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991). A further extension of *Stromberg* was sought in *Griffin*. There, the defendant argued that under *Yates* her conviction for a multiple-object conspiracy should be set aside because the evidence was inadequate to support conviction as to one of the objects. The Supreme Court rejected

the argument. It held that a general verdict is valid as long as one of the possible bases of conviction is supported by sufficient evidence. *Griffin*, 502 U.S. at 56-57. The Court's holding rested upon an important distinction from *Yates*:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59. In other words, "courts assume that juries can distinguish good proof from bad, but juries do not separate good law from bad. That's the line between *Yates* and *Griffin*." *Tenner v. Gilmore*, 184 F.3d 608, 611 (7th Cir. 1999).

Stewart argues that his situation falls on the *Yates* side of the line because the jury was instructed that it could convict him of mail and wire fraud if they found he had fraudulently schemed to obtain state insurance licenses, a legally insufficient theory after *Cleveland*. The charge to the jury did not specifically mention licenses. It did, however, refer the jury to the superseding indictment on various occasions for a description of the schemes alleged. The jury was instructed that in order to convict Stewart of mail and wire fraud it had to find that he "knowingly devised or intended to devise a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses, representations or promises as detailed in the superseding indictment." As mentioned above, the superseding indictment defined money and property to include licenses and the retention of licenses, as well as premiums from policyholders and customers, dividends, consulting and

management fees, and an inflated sales price for Summit.

We agree with Stewart that as a result of the later decided *Cleveland* case the jury charge, through the incorporation of the superseding indictment, contained a legally deficient theory of criminal liability. We disagree, however, with Stewart's contention that his convictions must therefore be set aside. To begin with, Stewart's convictions on counts 2 through 19 and 20 through 23 are valid because his money laundering convictions operate as a special verdict as to these counts[9]. "Special verdicts avoid the *Yates* problem, because the court then can be confident that the facts as the jury believed them to be are a legally proper basis of conviction." *Tenner*, 184 F.3d at 612.

To convict Stewart of money laundering as charged in counts 121 through 155 the jury was required to find that the money identified in the counts was "derived from specified unlawful activity, that is mail fraud, in violation of Title 18, United States Code, Section 1341, as charged in Counts 2 through 19 of this indictment, and wire fraud, as charged in Counts 20 through 23 of this indictment." Superseding Indictment at 60, 62, 64-68. Thus, Stewart's conviction on counts 121 through 155 makes it clear that the jury found that money, not licenses, was an object of the scheme alleged in counts 2 through 19 and 20 through 23. Since money is a proper object of a scheme to defraud under the mail and wire fraud statutes, we are "absolutely certain that the jury relied upon the legally correct theory to convict the defendant," and we will not set aside his conviction on counts 2 through 19 and 20 through 23. *Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (internal quotation omitted). As these counts were the predicate acts for Racketeering Act No. 2, it also stands.

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[9] Stewart was actually only convicted on counts 2, 4, 14, 16-19, and 22, as the other counts were stricken prior to trial. For simplification, however, we will refer to the overall group of counts that make up a scheme. We will also do this for counts 33 through 120, even though some of the individual counts in that group were also stricken.

As for counts 24 through 120 and the other three racketeering acts, the charge insofar as it referred to licenses was legally wrong[10]. However, the evidence was also insufficient to convict on the basis of fraudulently obtained licenses. At trial there was virtually no evidence regarding the obtaining or retaining of licenses. What little there was all referred to time periods before the time alleged in the superseding indictment. In such a case, we conclude that *Griffin*, not *Yates*, must control because "there is no possibility that the jury convicted the defendant[] on the improper charge." *United States v. Wilson*, 116 F.3d 1066, 1080 (5th Cir. 1997); *see United States v. Hanafy*, 124 F. Supp. 2d 1016, 1030 n.20 (N.D. Tex. 2000). Such a result is also necessary if we are to "recall the point of *Griffin*: a jury may be relied on to get the facts right and avoid logical errors." *Tenner*, 184 F.3d at 612.

In support of his position, Stewart points to the fact that the superseding indictment describes how he caused Parkway Life Insurance Company and Cathedral Life Insurance Company to be formed. Superseding Indictment at 37, ¶ 2; 25, ¶ 7. Since these insurance companies had to obtain new state regulatory licenses, Stewart argues that this is evidence the jury could have used to convict him of a scheme to obtain licenses. He ignores the fact that these formations occurred in 1989, at least three years before any crime or scheme alleged in the superseding indictment. The jury was specifically charged that to convict Stewart on counts 24 through 120 they needed to find that the schemes alleged in those counts were devised in late 1992 and early 1993[11].

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[10] As noted, under the prevailing authority of *Martinez*, the charge was legally correct when given. *Martinez* was subsequently abrogated by *Cleveland*.

[11] The relevant portions of the charge read as follows:

> Counts 24 through 32 charge a wire fraud scheme to deceive state insurance regulators involving reinsurance. The superseding indictment alleges that in late 1992 or early 1993 the defendant devised a scheme to deceive state regulators and others regarding the true and complete reinsurance arrangements involving Summit National Life Insurance Company, its subsidiary Fidelity General Life Insurance Company, and the Alabama Reassurance Company in

Stewart would thus have us presume that the jury ignored this legal instruction and also its duty as judges of the facts. Making this presumption would be contrary to the holding of *Griffin*, that "perverse factfinding should not be attributed to juries." *Tenner*, 184 F.3d at 612. It would also contravene "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987); *see Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985).

The above conclusion is supported and compelled by *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987). *McNally*, like *Cleveland*, involved a restriction of the scope of the federal mail fraud statute. In *McNally* a former Kentucky public official and a private individual were charged and convicted of violating the federal mail fraud statute based upon the theory that they "defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* at 352. The Supreme Court reversed their convictions on direct appeal, holding that § 1341 does not prohibit "schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

In restricting the reach of the mail fraud statute to exclude an intangible rights theory, *McNally* overturned a "line of decisions from the Courts of Appeals" holding the opposite. *Id.* Not surprisingly, the decision resulted in a deluge of petitions from defendants convicted

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order to inflate their financial statements.

Counts 33, 36 through 73, and 76 through 118 of the superseding indictment charge that from in or about December, 1992 to in or about July, 1993 the defendant devised and intended to devise a scheme to defraud and to obtain money and property by inflating Summit National Life Insurance Company's financial statements with overvalued promissory notes from its corporate parent, SNL Corp., in order to deceive regulators, the buyer, and others regarding the true financial condition of the company and that the United States mails were used in furtherance of this scheme.

under the pre-*McNally* interpretation of § 1341 who sought to have their convictions overturned. One such case was *United States v. Asher*, 854 F.2d 1483 (3d Cir. 1988). In *Asher* the defendant was convicted on five counts of mail fraud due to his participation in a scheme to accept bribes in exchange for awarding a no-bid Social Security tax ("FICA") recovery contract to CTA Limited ("CTA"). On appeal Asher argued that *McNally*, which was issued after his conviction, mandated that his convictions be overturned.

The court examined the treatment other courts had given post-*McNally* cases and found that, "those cases that have sustained mail fraud convictions have done so where the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state." *Id.* at 1494. It explained:

> Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, *McNally*'s proscriptions would prevent upholding conviction on appeal. Where, on the other hand, a violation of the rights involved would result in depriving another of something of value, and the indictment, the proofs and the instructions are based on that fact, then the presence of intangible rights language will not prove fatal on appeal.

Id. Applying the above precepts, the court upheld Asher's mail fraud convictions. It arrived at this result by first noting that both the indictment and the jury instructions in the case contained numerous references to "concrete economic or property losses." *Id.* at 1495. While the jury instructions also made references to intangible losses, this was not fatal because the court was "satisfied that the government ... could not have proved a violation of intangible rights without simultaneously proving that the Commonwealth of Pennsylvania was deprived of money as the result of the no-bid contract awarded to CTA." *Id.* at 1496. Since the jury "could not have found a fraudulent scheme that consisted solely of depriving the citizens of their right to honest government that did not

also involve tangible losses," Asher's conviction was allowed to stand. *Id.*

The same result was reached in *United States v. Osser*, 864 F.2d 1056 (3d Cir. 1988), in a collateral attack filed after the defendant's conviction was final and after the Supreme Court decided *McNally*. Osser, a City Commissioner of Philadelphia, was found guilty of seven counts of mail fraud in 1973. The jurors in Osser's case were instructed that they could find a violation of § 1341 on several different theories. One theory involved a kickback scheme in which Osser participated. That theory was still valid after *McNally*. The other involved his deprivation of the citizens of Philadelphia of his honest and impartial services through a bid rigging scheme, an invalid theory after *McNally*.

Osser argued that his convictions must be vacated "because the issue of guilt was submitted to the jury on two theories, one of which was invalid," essentially the same argument Stewart is making under *Yates*. *Osser*, 864 F.2d at 1058. After analyzing *Asher*, the court disagreed, reasoning that once the jury "found that Osser had participated in the bid rigging, [it] could not escape finding financial loss as part of the scheme." *Id.* at 1063. Since Osser's actions unquestionably "resulted in a substantial monetary detriment to the City, and no rational juror could conclude otherwise," the court refused to vacate Osser's convictions and affirmed the district court's denial of his coram nobis petition.[12]

We see no practical distinction between *Asher* and *Osser* and Stewart's case. *Cleveland*, like *McNally*, restricted the scope of the federal mail fraud statute by holding that state issued licenses were not property for its purposes. Stewart, like Asher and Osser, was convicted

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[12] Prior to reaching the merits of Osser's case, the court affirmed the district court's determination that Osser had procedurally defaulted his *McNally* claim under *Frady* because he did not raise it at trial or on appeal. This supports our earlier conclusion that a claim such as the one Stewart is making under *Cleveland* can be procedurally defaulted.

by a jury that heard references to what turned out to be an invalid legal theory in the indictment and the charge. Like the courts in *Asher* and *Osser*, we conclude that the mere presence of the invalid license theory does not mandate that Stewart's conviction be vacated. We do so because there is no way the jury could have found that Stewart committed mail fraud by devising a scheme to obtain or retain licenses and not have found he devised a scheme to obtain other money and property as well. *See Asher*, 854 F.2d at 1496. Even if the jury were to have found a scheme to obtain licenses, the ultimate purpose of such a scheme necessarily would have been to enable Stewart to obtain money and property in the form of premiums from policyholders and customers, dividends, consulting and management fees, and the inflated sales price for Summit. Since "the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses," Stewart's mail and wire fraud convictions will not be vacated because of any reference in the charge to licenses. *Id.* at 1494.

III.

Stewart also argues in his § 2255 motion that the superseding indictment was defective because it failed to allege explicitly that he made "material" misrepresentations in furtherance of his schemes. This argument was not raised previously. Subsequent to Stewart's indictment and conviction the Supreme Court held in *Neder v. United States*, 527 U.S. 1, 25, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999) that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." Because the word "material" does not appear in the superseding indictment's allegations of mail and wire fraud, Stewart argues that the superseding indictment is fatally deficient and his convictions must be vacated.

An indictment must set forth all of the elements of an offense, and if it does not do so, it is fundamentally flawed. *United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999). When a challenge to the indictment's sufficiency is raised for the first time after trial, as is the case here, we are to "construe the indictment liberally in favor of

validity." *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir. 2000). Even assuming that Stewart's contention is not procedurally defaulted, we conclude that it is without merit.

An indictment satisfies the requirements of the Fifth and Sixth Amendments "if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). Although it is vital for an indictment to include all elements of a charged offense, "the law does not compel a ritual of words" when determining if an indictment is sufficient. *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989); *see United States v. DeVegter*, 198 F.3d 1324, 1330 (11th Cir. 1999). Our Court of Appeals has instructed:

> An indictment may set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished. Furthermore, an indictment that charges a legal term of art sufficiently charges the component parts of the term.

Cefaratti, 221 F.3d at 507 (internal quotations and citations omitted).

In support of his position, Stewart heavily relies on *United States v. Spinner*. There the court on direct appeal found the indictment for access device fraud to be deficient because it failed to allege the interstate commerce element of the crime charged. *Spinner*, 180 F.3d at 515-16. The access device fraud statute, 18 U.S.C. § 1029(a)(5), specifically requires that the "offense affects interstate or foreign commerce."

We reject Stewart's reliance on *Spinner*. Unlike *Spinner*, the

superseding indictment here did not omit any statutory element of the crimes charged. The mail and wire fraud statutes require "a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343. They nowhere use the word "material." Mirroring the statutes, the superseding indictment stated that Stewart "devised and intended to devise a scheme to defraud and to obtain money or property, directly or indirectly, by means of false and fraudulent pretenses and representations."

The word "fraud" is a "legal term of art." *Cefaratti*, 221 F.3d at 507. At common law, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of material fact." *Neder*, 527 U.S. at 22; *see United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996). Here, the superseding indictment repeatedly charges that Stewart made false and fraudulent representations and promises. Because the word "fraudulent" clearly encompasses the notion of materiality, the superseding indictment cannot be considered deficient[13].

In addition, we conclude that by any reasonable construction, the superseding indictment identifies misrepresentations that can only be characterized as material even though the word "material" is not used. *See United States v. Richards*, 204 F.3d 177, 192 (5th Cir.), *cert. denied*, 121 S. Ct. 73 (2000). In *Neder*, the Court explained that "a matter is material if ...'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1976)).

The superseding indictment is replete with Stewart's misrepresentations concerning the financial well-being of Summit and

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We note that Stewart does not argue that the jury charge on mail and wire fraud was incorrect. The jury was specifically instructed that it must find a false statement or misrepresentation of material fact in order to convict Stewart of mail and wire fraud.

EBL, sham reinsurance agreements, and the movement of funds between entities he controlled. For example, the superseding indictment charges that Stewart: provided false financial statements and reports to regulators, policyholders, customers, insurance agents, and others in order to conceal the financial weakness of Summit; falsely represented that Summit was in excellent financial condition when in fact it was statutorily insolvent; reclassified assets of entities he owned and backdated journal entries; and included a sizeable but worthless promissory note as an asset on Summit's books.

There can be no doubt that a reasonable person would attach importance to the above misrepresentations. An insurance agent contemplating selling policies for Summit, a customer considering purchasing a policy from Summit, a current policyholder making payments to Summit, or a regulator charged with overseeing Summit's compliance with the law all would find the false statements and representations Stewart made important, relevant, and material. Clearly, an "inference of materiality" arises, especially when we "construe the indictment liberally." *Cefaratti*, 221 F.3d at 507. We therefore reject Stewart's contention that the superseding indictment was insufficient.

In sum, the superseding indictment in this case performed its constitutional function. It fully apprised Stewart of the charges against him and did not hinder him from presenting a vigorous defense prior to and during trial. Thus, Stewart's mail and wire fraud convictions will not be vacated because the word "material" does not appear in the counts of mail and wire fraud contained in the superseding indictment.

IV.

Stewart argues that he is entitled to various forms of relief due to the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. Stewart contends that the *Apprendi* rule mandates that his conviction be set aside, or alternatively, that his sentence be reduced. He also maintains that his forfeiture and restitution sentences are invalid under *Apprendi*. We have already held that *Apprendi* does not apply retroactively to cases on collateral review and therefore will not address here the merits of these arguments. *See United States v. Gibbs*, 125 F. Supp. 2d 700 (E.D. Pa. 2000).

V.

Stewart also raises several other ineffective assistance of counsel claims that we find completely meritless. Finally, Stewart argues numerous other grounds that he believes mandate vacatur of his convictions and/or sentence. They are unpersuasive and require no discussion.

VI.

In conclusion, the motion of Allen Stewart under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence will be denied.

ORDER

AND NOW, this 7th day of June, 2001, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of Allen W. Stewart under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence is DENIED; and

(2) a certificate of appealability is not issued.

BY THE COURT:

Bartle, J.

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART

Criminal Action No. 96-583

Civil Action No. 00-6299

United States District Court for the

Eastern District of Pennsylvania

October 23, 1997

(1997 WL 688815)

This is a criminal action in which defendant Allen Stewart is charged under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The superseding indictment also contains separate counts of mail and wire fraud as well as money laundering and seeks forfeiture of certain assets. Presently before the court is the motion of the defendant to dismiss the superseding indictment for failure to state an indictable offense[1].

In a motion to dismiss an indictment we accept as true the facts alleged and determine if those facts "constitute the violation of law for which [the defendant] is charged." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir.), *cert. denied*, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 107 (1988); *United States v. Seitz*, 952 F.Supp. 229, 230 n. 1 (E.D.Pa.1997). If the facts do not constitute a violation of federal law, the charges should be dismissed. *Polychron*, 841 F.2d at 834.

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[1] The original indictment was filed on December 4, 1997. Defendant filed a motion to dismiss the indictment, which we denied in a Memorandum and Order on February 21, 1997. The government filed its superseding indictment on March 12, 1997.

The superseding indictment, which consists of 157 counts, charges that defendant committed a pattern of racketeering activity through his association with Summit National Life Insurance Company ("SNLIC"), an insurance company now incorporated in Pennsylvania. Defendant originally purchased SNLIC in 1988, when it was incorporated in Ohio. By acts of wire and mail fraud, he allegedly devised and furthered schemes to siphon millions of dollars out of SNLIC as well as Equitable Beneficial Life Insurance Company ("EBL"), another Pennsylvania life insurance company he controlled. Through a series of transactions which inflated the book value of SNLIC's and EBL's assets, he purportedly concealed his theft of funds from the public, insurance regulators, policyholders, customers, potential customers, insurance agents, and others.

Specifically, Count 1 charges defendant with violating § 1962(c) of RICO. Counts 2 through 120 assert that defendant committed mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. The superseding indictment declares in several places that defendant "devised and intended to devise a scheme to defraud and to obtain money and property, directly and indirectly, by means of false and fraudulent pretenses and representations." *See, e.g.*, Superseding Indictment at p. 23, ¶ 3. It describes the various mail and wire fraud schemes created by defendant. It details the mailings and wires, including the places from which they were sent and the persons to whom they were directed. The first scheme, set forth in Counts 2 through 23 involved the removal of valuable assets from SNLIC and EBL. To facilitate this scheme defendant purportedly sent quarterly financial statements to the Pennsylvania Insurance Department, among others. Checks for payment of printing or publication of annual statements were sent to publishing companies, letters were sent to Merrill Lynch seeking the transfer of funds, and wires were even sent to EBL itself[2].

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[2] Count 2 states that an abstract of an SNLIC annual statement was mailed to Corporation Publication in Nevada.

The government also alleges, in Counts 24 through 32, a design to deceive regulators regarding reinsurance. It was advanced through wires sent to the California Department of Insurance and to and from Alabama Reassurance Company. Counts 33 through 120 portray a stratagem to inflate SNLIC's financial statements with an overvalued promissory note from its corporate parent, SNL Corporation. SNLIC financial statements, identifying this inflated asset, were mailed to insurance departments in 43 states, the National Association of Insurance Commissioners, and A.M. Best Company. Several checks were also sent to publishing companies to pay for the printing or publication of the SNLIC financial statements.

According to the superseding indictment, the object of these three schemes was to "obtain, directly and indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales price for the companies." Superseding Indictment, at p. 31, ¶ 34. The remainder of the superseding indictment includes allegations that defendant illegally laundered money in violation of 18 U.S.C. § 1957. The final two counts seek forfeiture of money and property obtained as a result of his alleged racketeering and money laundering activity. In his pending motion, defendant asserts various bases for the dismissal of the superseding indictment. Only one of these arguments requires any extended discussion. Defendant contends that, under the mail and wire fraud statutes, an indictment must allege that any deceit or fraud was directed at the party from whom money or property was sought. According to defendant, the superseding indictment is fatally defective because it states that the fraud was directed at the government regulators but does not specify that any money or property was sought or taken from them. Even if the insurance department officials were the only intended victims, defendant's argument is without merit.

The mail fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341[3]. The Supreme Court has explained that the elements of this crime include: "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

In *McNally v. United States*, 483 U.S. 350, 358-59, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that a defendant's scheme or artifice must have as its purpose to deprive a victim of money or property in order to be convicted under the mail fraud statute. *McNally* involved the prosecution of a Kentucky public official and a private citizen. They had participated in a scheme whereby an insurance agency receiving business from the Commonwealth of Kentucky paid a portion of the commissions the agency received from insurers to another insurance agency in which the official had an interest. *Id.* at 352-54. While the Commonwealth lost no money or property in the scheme, the federal prosecutor claimed that this ploy "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353. However, the Supreme Court concluded that this was too broad a reading of the mail fraud statute and overturned the conviction. *Id.* at 360. It held that a scheme or artifice to

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[3] The wire fraud statute is identical except that the wrongdoer "transmits or causes to be transmitted by means of wire, ... any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343.

defraud must have as its aim the purloining of money or property. *Id.* at 359.

Unhappy with the Supreme Court's decision in *McNally*, Congress enacted 18 U.S.C. § 1346. See 134 Cong. Rec. H11108-01, 1988 WL 182261 (Oct. 21, 1988). As a result of this statute, a "'scheme or artifice to defraud' now includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. While other Courts of Appeals have determined that this language is limited to the honest services of government officials, the Third Circuit has not passed upon its scope. *See United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3204 (U.S. Sept. 15, 1997) (No. 97-486); *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir.1996).

The Third Circuit has made clear, nonetheless, that the mail fraud statute is to be construed broadly. *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 595 (1990). In *Martinez*, the defendant was convicted of mail fraud for his role in obtaining for a co-conspirator a medical license from the Commonwealth of Pennsylvania. *Id.* at 710-11. On appeal he contended that the mail fraud statute required a scheme or artifice to deprive a victim of money or property but that the Commonwealth of Pennsylvania, as the victim, did not suffer any such loss. *Id.* at 713. The Third Circuit rejected this argument. It held that the medical license constituted property within the meaning of the statute. *Id.* at 713-15. It stated:

> *McNally* only requires that the "[g]overnment's interests as property holder" be implicated in order for a scheme to fall within the mail fraud statute ... a license is essentially one manifestation of the government "largess" of the modern state which "is originally public property, comes from the state, and may be withheld completely." ... what the Commonwealth (and

> derivatively its people) lost was the right to keep its medical licenses to itself and to bestow them on persons who had fairly earned them.

Id. at 714 (citations omitted).

In Pennsylvania as in other states as well, the business of insurance, like the medical profession, is highly regulated. Without state authorization, one cannot open or operate an insurance company anymore than one can open or conduct a medical practice. An insurer in the Commonwealth must obtain a "certificate authorizing the company to commence business." Pa. Stat. Ann. tit. 40, § 405 (West 1992). To maintain its authority to do business, an insurer must remain financially sound. One way for the Insurance Department to determine if an insurer continues to be viable is to review its financial statements, which it is required by law to file. Id. § 443(a)(1). Failure to file can result in fines and a prohibition against writing new business. Id. § 443(e)(1). In addition, the Insurance Commissioner may even "suspend, revoke or refuse to renew the certificate of authority of any insurer failing to file its annual statement when due." Id. § 443(e)(3)[4].

Implicit, of course, is the duty to submit accurate information. By filing purportedly deceptive financial statements which appeared to show SNLIC as a financially healthy insurer, defendant schemed to retain the certificate authorizing SNLIC to conduct business in Pennsylvania and other states. While the certificate, like the medical license in *Martinez*, may take on value only in the hands of the recipient, it is the property of the Commonwealth nonetheless. *Martinez*, 905 F.2d at 713. If a recipient retains a certificate through fraud and deception, the Commonwealth and its people lose the right to have the certificate returned and to keep it from those who no longer are fairly entitled to it.

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[4] The Insurance Commissioner may also require that the insurer file its financial statements with the National Association of Insurance Commissioners. Pa.Stat.Ann. tit. 40, § 443(a)(2) (West Supp.1997).

Id. at 714.

Even if the certificate authorizing an insurer to do business is not property, we are still not required to dismiss the superseding indictment. In several places, the superseding indictment makes clear that the defendant "devised and intended to devise a scheme to defraud and to obtain money and property." Superseding Indictment at p. 23, ¶ 3, p. 39, ¶ 12, p. 45, ¶ 3 (emphasis added). Thus, more than an effort to obtain money and property is alleged. Under 18 U.S.C. § 1346, a scheme to defraud is defined to "include[] a scheme or artifice to deprive another of the intangible right of honest services." The scheme here had the effect of depriving the Commonwealth and its citizens of the honest services of its public servants who regulate insurance companies doing business within its borders. Defendant's stratagem was to deceive the Pennsylvania Insurance Department into believing that SNLIC was a healthy insurance company when it was not. Because of defendant's alleged fraud, the Department was prevented from doing its sworn duty to protect the SNLIC policyholders and the insurance buying public generally.

Defendant relies upon *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir.1989), in support of his argument that the mail and wire fraud counts are deficient. In that case, the New York Superintendent of Insurance filed a civil RICO action, predicated on acts of mail fraud, against a corporation and its officers. The Superintendent alleged that the defendants absconded with millions of dollars from two insurers, and then hid the theft of such funds. *Id.* at 17. However, *Corcoran* is inapposite here for several reasons. First it was a civil case, applying the law prior to the enactment of 18 U.S.C. § 1346. The Court of Appeals for the Second Circuit held that the superintendent, acting as Liquidator, could not assert claims of mail fraud against defendants who allegedly looted two insurers. *Id.* at 17, 21. The court found that his complaint lacked allegations that he had been deprived of any property interest. *Id.*

at 21[5]. Unlike *Corcoran*, the government here alleges that the regulators *were* deprived of a property interest. *Corcoran* seemed to take a much narrower view of property than the Third Circuit set forth in *Martinez*. We are bound by *Martinez*, not *Corcoran*[6].

Several of the defendant's other arguments address concerns that the jury will be confused by the various schemes as set forth in the superseding indictment. If a conviction occurs, he will not know upon which scheme the conviction is based. Defendant also challenges the incorporation of paragraphs and counts into other counts. Our focus on a motion to dismiss the superseding indictment is on whether the defendant himself is appropriately put on notice of the charges against him so that he may prepare his defense. To the extent that any argument concerning jury confusion has merit, it can be addressed at trial through the redaction of the superseding indictment, a detailed verdict sheet, or an explanatory charge.

Defendant's remaining arguments are without merit and require no discussion. In conclusion, the motion of the defendant to dismiss the superseding indictment will be denied.

ORDER

AND NOW, this 22nd day of October, 1997, for the reasons set forth in the accompany Memorandum, the motion of defendant Allen W. Stewart

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[5] However, the court also found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." *Corcoran*, 886 F.2d at 20.

[6] To the extent the defendant also seeks dismissal of racketeering act 1 contained in RICO Count 1, his argument is also without merit. Racketeering act 1, entitled a "[s]cheme to conceal the insolvency of [[SNLIC] to permit the defendant to continue to control and operate it," lists multiple acts of mail and wire fraud as its basis. These acts included sending financial statements to insurance departments, mailing checks to publishing companies for payment of printing/publication costs, as well as wiring funds.

to dismiss the superseding indictment is DENIED.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. Article III of the United States Constitution provides in pertinent part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States. . . .
>
> The Trial of all Crimes. . .shall be by jury. . . .

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a[n] infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor shall any person. . .be deprived of life, liberty, or property, without due process of law. . .

3. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right. . .to be informed of the nature and cause of the accusation [and] to have the Assistance of Counsel for his defence.

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything

represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in

which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1957 provides:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $ 10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.
(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--
(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or
(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;
(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and
(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

Federal Rule of Criminal Procedure 12(b) provides in pertinent part:

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

Federal Rule of Appellate Procedure 1(a)(1) provides:

> These rules govern procedure in the United States courts of appeals.

Federal Rule of Appellate Procedure 22 provides in pertinent part:

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

Federal Rule of Appellate Procedure 47(a)(1) provides:

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

Third Circuit Local Appellate Rule 22.2 provides:

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should

issue. . .If an order denying a petition under §2254 or §2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report.

(2)

MAR 6 2003

CLERK

NO. 02-1165

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Pursuant to *Miller-El v. Cockrell*, – U.S. – (No. 01-7662, 2/25/03), a decision entered three weeks after Petitioner's certiorari petition was filed, this Court should remand this case to the United States Court of Appeals for the Third Circuit for further proceedings[1].

Petitioner's certiorari petition was filed on February 4, 2003 and is scheduled for conference on Friday, March 7, 2003. Petitioner contended that the procedure used to deny his petition for certificate of appealability ("COA") violates the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[2] and F.R.App.P. 22(b)(1). See Certiorari Petition, No. 02-1165, pp. 26-29. Noting that both the district court and the Third Circuit denied him a COA without explanation, App. 1a, 22a, Petitioner asserted that Third Circuit Local Appellate Rule 22.2 ("LAR 22.2") violates both the AEDPA and F.R.App.P. 22(b)(1) in permitting the district court to deny a COA, without explanation, at the same time it denies relief under 28 U.S.C. § 2255.

This Court's decision in *Miller-El*, issued three weeks after Petitioner filed his certiorari petition, demonstrates that Petitioner's challenge to LAR 22.2 is meritorious. *Miller-El* requires the district court to apply the AEDPA to Petitioner's constitutional claims and *explain* whether or not they have debatable merit. *Id.*, slip op. at 10. LAR 22.2 contravenes *Miller-El* by permitting the district court to deny Petitioner a COA without explanation.

Since the lower courts failed to explain their rationale for denying Petitioner a COA, it is certain they applied the standard of

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[1] Jeff Atkins, a supervisor in the Clerk's Office, graciously advised counsel for Petitioner that it was permissible to file Petitioner's supplemental brief on 8½ x 11 inch paper for the reason that *Miller-El* was issued last week, leaving Petitioner with very limited time to file a supplemental brief prior to the scheduled conference date of Friday, March 7, 2003.

[2] Pub.L.No. 104-132, April 24, 1996.

review prohibited by *Miller-El*. *Miller-El* requires lower courts to assess whether a COA petition presents claims of *debatable* merit. *Id.* Lower courts are expressly forbidden at the COA stage to decide whether the petitioner can prevail on the merits of his appeal. *Id.* Here, it is clear the lower courts decided Petitioner could not prevail in his appeal, a determination they "lack jurisdiction" to make at the COA level. *Id.*

For these reasons, this Court should vacate the Third Circuit's order denying Petitioner a COA and remand for further proceedings consistent with *Miller-El*.

A. Summary of *Miller-El*

In *Miller-El*, the Fifth Circuit affirmed the district court's denial of the petitioner's COA on the ground that "there was insufficient merit to the case." *Id.*, slip op. at 4. This Court reversed and remanded for further proceedings, finding that the Fifth Circuit applied an incorrect standard of review:

> Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack [v. McDaniel]*, 529 U. S. [473], 481 [(2000)]; *Hohn [v. United States]*, 524 U. S. [236], 241 [(1998)]. The Court of Appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 13.

The Court observed that issuance of a COA is a "jurisdictional prerequisite" to appeal, "because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." *Id.* at 10 (*citing* 28 U.S.C. § 2253(c)(1)). Consequently, "until a COA has been issued *federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.*" *Id.* (emphasis added).

The Court defined the appropriate standard of review for COA petitions as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.* This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."' *Barefoot [v. Estelle],* [463 U.S. 880,] 893, n. 4 [(1983)].

Id. (emphasis added).

B. Application of *Miller-El* To This Case

Miller-El requires the court of appeals to determine whether the "district court's application of AEDPA to petitioner's constitutional claims" is "debatable amongst jurists of reason." *Id.* In the case at bar, the district court provided *absolutely no explanation* of its application of AEDPA to Petitioner's claims, or indeed whether it applied the AEDPA at all. Without such explanation, the Third Circuit could not evaluate whether Petitioner's claims had debatable merit. Therefore, this Court should remand this case to the Third Circuit, which in turn should instruct the district court to examine Petitioner's claims under *Miller-El*'s strictures.

Furthermore, because the Third Circuit failed to explain why it denied Petitioner a COA, it clearly failed to apply the proper "debatable among jurists of reason" standard to Petitioner's COA application. Instead, it denied the COA because it believed Petitioner would not prevail on the merits, a standard it lacked jurisdiction to apply at the COA stage. *Miller-El* at 10. Thus, remand is necessary in order for the Third Circuit to apply the proper "debatable among jurists of reason" standard to Petitioner's COA application.

Finally, LAR 22.2, which permits the district court to deny the COA without explanation, runs afoul of *Miller-El*'s mandate that the court of appeals "look to the district court's application of AEDPA" when deciding a COA petition. *Id.* at 10. By authorizing a procedure that abridges the independent COA review required of the district judge who denied the § 2255 motion, the local rule deprives an appealing party his substantive right to receive a "first level" review which either grants a COA or explains its denial.

For these reasons, and for the reasons provided in Petitioner's certiorari petition, this Court should issue a writ of certiorari to the

United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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DATE: March 8, 2003